SUPREME COURT
FILED
MAY 27 2005
OFFICE OF THE CLERK

(16)

No. 04-1264

IN THE

Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,

Petitioner,

v.

JOHN A. CARDEGNA AND DONNA REUTER,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

REPLY TO BRIEF IN OPPOSITION

DAVID J. YOUNG
AMY L. BROWN
PIERRE H. BERGERON
SQUIRE, SANDERS & DEMPSEY LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20044

CHRISTOPHER LANDAU
Counsel of Record
MICHAEL SHUMSKY
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

May 27, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

I. Respondents Provide No Reason To Deny Review. 1

II. Respondents Are Wrong On The Merits. 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page(s)

CASES

3H & Assocs., Inc. v. Hanjin Eng'g & Constr. Co.,
No. 97-16751, 1998 WL 657722
(9th Cir. Sept. 3, 1998) 5
Alabama Catalog Sales v. Harris,
794 So. 2d 312 (Ala. 2000) 1
Bess v. Check Express,
294 F.3d 1298 (11th Cir. 2002) 1, 5
Betts v. Ace Cash Express, Inc.,
827 So. 2d 294 (Fla. Dist. Ct. App. 2002) 3
Betts v. McKenzie Check Advance of Florida, LLC,
879 So. 2d 667 (Fla. Dist. Ct. App. 2004) 3
Burden v. Check Into Cash of Ky., LLC,
267 F.3d 483 (6th Cir. 2001) 5
Chastain v. Robinson-Humphrey Co.,
957 F.2d 851 (11th Cir. 1992) 5
Harter v. Iowa Grain Co.,
220 F.3d 544 (7th Cir. 2000) 5
Howsam v. Dean Witter,
537 U.S. 79 (2002) 5, 6
Jenkins v. First Am. Cash Advance of Ga., LLC,
400 F.3d 868 (11th Cir. 2005) 1, 5
Lawrence v. Comprehensive Bus. Servs. Co.,
833 F.2d 1159 (5th Cir. 1987) 5
McKenzie Check Advance of Fl. v. Betts,
Fla. S. Ct. No. SC04-1825 3
Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 4, 5
Sandvik AB v. Advent Int'l Corp.,
220 F.3d 99 (3d Cir. 2000) 5
Snowden v. Checkpoint Check Cashing,
290 F.3d 631 (4th Cir. 2002) 5

Southland Corp. v. Keating,
465 U.S. 1 (1984) 1
Sphere Drake Ins. Ltd. v. All Am. Ins. Co.,
256 F.3d 587 (7th Cir. 2001) 5
Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.,
925 F.2d 1136 (9th Cir. 1991) 5

STATUTES AND RULES

15 U.S.C. § 1601 *et seq.* 2
15 U.S.C. § 1666 2
Fl. Stat. § 560.401 *et seq.* 3
Fl. Stat. § 560.402-02 3
Fl. Stat. § 560.402-03 3
Fl. Stat. § 560.402-04 3

INTRODUCTION

Respondents cannot, and do not, deny that the Florida Supreme Court's decision below, like the Alabama Supreme Court's decision in *Alabama Catalog Sales v. Harris*, 794 So. 2d 312 (Ala. 2000), conflicts with the decisions of no fewer than six federal courts of appeals. Rather, respondents insist that the decision below is correct on the merits, and that the contrary federal appellate cases are "mistaken," "indefensible," and "simply wrong." Opp. 21-22. Although respondents themselves are incorrect on that score, the key point for present purposes is that the opposition brief implicitly underscores that this Court's review is warranted: in respondents' view, six federal courts of appeals have erroneously decided an important issue of federal law in a manner squarely inconsistent with the highest courts of two States. If ever an opposition brief made the case for a grant of certiorari, this is it.

I. Respondents Provide No Reason To Deny Review.

Respondents devote the first 23 pages of their 25-page opposition brief to arguing that the decision below is correct, and that the contrary federal appellate authorities are incorrect. Respondents are certainly entitled to that opinion, however misguided, but their insistence on arguing the merits provides no reason for this Court to deny review. To the contrary, respondents expressly acknowledge that the decision below conflicts with two recent decisions by the Eleventh Circuit, *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 880-82 (11th Cir. 2005), and *Bess v. Check Express*, 294 F.3d 1298, 1304-06 (11th Cir. 2002), *see* Opp. 21-23, so that plaintiffs in Florida (or, for that matter, Alabama, in light of *Alabama Catalog Sales*) can avoid arbitration by filing in state, rather than federal, court. Needless to say, that conflict—if left unreviewed—would "encourage and reward forum shopping" antithetical to the Federal Arbitration Act ("FAA"). *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). Federal arbitration rights are effectively worthless if they can be defeated by

forum-shopping. Accordingly, this Court should grant certiorari to resolve the conflict.

Other than insisting that they are correct on the merits, respondents' only objection to certiorari is the passing suggestion, made in the final page-and-a-half of their brief, that "the ruling below is likely to largely only relate to the payday lending industry." Opp. 24. That argument, as the various *amicus* briefs underscore, is manifestly incorrect.

Under the decision below, a plaintiff can avoid an arbitration agreement by simply challenging the underlying contract as illegal—on *any* ground. That approach is by no means limited to payday advance contracts; rather, it is limited only by the imagination of the plaintiffs' bar. The United States Chamber of Commerce, the Florida Bankers Association, and the American Bankers Association understand this point perfectly well; that is why they have urged this Court to grant the petition. A sizeable chunk of all arbitrations in this country involve consumer lending agreements, and virtually all such agreements can be challenged as usurious or otherwise in violation of a maze of state and/or federal laws, including the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and the Fair Credit Billing Act, 15 U.S.C. § 1666. Indeed, in this highly regulated day and age, virtually *all* contracts—from construction contracts to energy sales contracts to franchise agreements—can be (and have been) challenged as illegal. *See* FBA/ABA *Amicus* Br. 6-7. The Florida Supreme Court's decision below, like the Alabama Supreme Court's earlier decision to the same effect, thus effectively strips defendants of their federal arbitration rights by allowing plaintiffs to defeat those rights at will by challenging the underlying contract (but not the arbitration clause itself) as illegal on any ground.

There is nothing "unusual" about the payday advance business, Opp. 24, that changes any of the above. Respondents' assertion that petitioner is not a "legitimate business

enterprise," *id.*, is manifestly incorrect. The payday advance business is not only lawful in Florida (as well as other States), but is heavily regulated by both state and federal law. *See* CFSA *Amicus* Br. 6-7. Under Florida law, a payday advance is a deferred presentment transaction, not a loan subject to state usury laws. *See* Fl. Stat. §§ 560.402-04. Accordingly, respondents cannot claim that the transactions at issue here violate current Florida law; at most, they can claim (erroneously) that the transactions violated Florida law *prior* to the enactment of the Deferred Presentment Act, Fl. Stat. § 560.401 *et seq.*, in 2001.[1] Respondents' assertion that this "entire line of business operated contrary to the rule of law and is per se illegal," and their attempt to equate payday advance businesses with "cocaine sellers or child pornographers," Opp. 24, is thus as baseless as it is offensive.[2]

---

[1] The Florida intermediate appellate courts are divided on whether payday advance transactions executed *prior* to the enactment of the Deferred Presentment Act in 2001 are loans governed by state usury laws. *Compare Betts v. Ace Cash Express, Inc.*, 827 So. 2d 294, 297 (Fla. Dist. Ct. App. 2002) (holding that such transactions are not loans governed by state usury laws) *with Betts v. McKenzie Check Advance of Florida, LLC*, 879 So. 2d 667, 672-74 (Fla. Dist. Ct. App. 2004) (holding that such transactions are loans governed by state usury laws). As respondents note, *see* Opp. 6, the Florida Supreme Court is now considering that issue on the merits. *See McKenzie Check Advance of Fl. v. Betts*, Fla. S. Ct. No. SC04-1825 (review granted Sept. 17, 2004). Respondents err, however, by suggesting in passing that "[i]f that Court rejects the claims of McKenzie plaintiffs, that will render the instant case moot." Opp. 6. The only issue presented here is whether the trial court correctly denied petitioner's motion to compel arbitration. No resolution of *McKenzie* (which does not involve arbitration) could "moot" that issue. Petitioner has not even moved to dismiss respondents' claims on the merits. Thus, regardless of how *McKenzie* is decided, this case will remain alive for resolution of the threshold question of *who decides* here whether the challenged transactions are illegal—an arbitrator or a court.

[2] Respondents' description of petitioner's business in Florida is also replete with false or misleading statements. For example, it is simply untrue that petitioner permitted its customers "to extend their debt or roll-over their loans ... by paying 'service fees' when they became due," Opp. 5, since

II. Respondents Are Wrong On The Merits.

Because respondents cannot offer any reason for this Court to deny review of the conflict noted above, they devote the bulk of their efforts to arguing that the Florida Supreme Court is correct on the merits, and that the six federal appellate courts to have concluded otherwise are all wrong. As noted above, that argument misses the point, because the only issue presented here is whether this Court should grant review in the first place. Nonetheless, respondents' merits-based arguments deserve a brief response.

Respondents repeat over and over again the mantra that an illegal contract is void *ab initio*, as if that proposition decided the issue in this case. It does not: as Justice Cantero explained in dissent below, "[t]he issue in this case is not whether a check-cashing contract is void as usurious," but "*who decides* whether the contract is void—the arbitrator, as provided in the contract itself, or the court." Pet. App. 13a (emphasis in original). Accordingly, respondents (like the Florida and Alabama Supreme Courts) simply beg the question by insisting that a court cannot compel arbitration because the underlying contract is allegedly illegal. Under the FAA, the validity of an arbitration clause is severable from the validity of the underlying contract as a matter of federal law. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967). Thus, the task of a court presented with a motion to compel arbitration under the FAA is sharply limited: the court must determine whether there is any challenge to the making of the agreement to arbitrate. *See id.* If so, the court must resolve that challenge; if not, the court must compel arbitration. *See id.*

---

petitioner never permitted "roll-overs" in Florida, and thus charged no such fees. Because these factual issues have no bearing on the legal issue presented here, however, petitioner will not burden this Court with a point-by-point refutation.

Respondents (like the Florida and Alabama Supreme Courts) thus miss the point by insisting that the key issue here is whether the underlying contract is voidable or void under state law. The FAA draws no such distinction; to the contrary, as *Prima Paint* makes clear, the FAA draws a distinction between challenges that go to the making of an arbitration agreement and those that do not. *See id.* In some cases, an allegation that the underlying contract is void may implicate the making of an arbitration agreement—*i.e.*, an allegation that the entire contract was forged, or signed by a signatory without authority. *See, e.g., Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 110 n.9 (3d Cir. 2000); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992); *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1139-42 (9th Cir. 1991). In other cases, however, an allegation that the underlying contract is void does *not* implicate the making of an arbitration agreement—*i.e.*, an allegation that the underlying contract violates some state or federal law. *See, e.g., Jenkins*, 400 F.3d at 880-82; *Bess*, 294 F.3d at 1304-06; *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 636-38 (4th Cir. 2002); *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483, 489-90 (6th Cir. 2001); *Harter v. Iowa Grain Co.*, 220 F.3d 544, 550 (7th Cir. 2000); *3H & Assocs., Inc. v. Hanjin Eng'g & Constr. Co.*, No. 97-16751, 1998 WL 657722, at *2 (9th Cir. Sept. 3, 1998) (unpublished); *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1161-62 (5th Cir. 1987). The void/voidable distinction is thus unhelpful in deciding the only question that really matters under *Prima Paint*: whether the challenge goes to the making of an agreement to arbitrate.

Respondents finally argue that "[p]etitioners' position also conflicts with this Court's decision in *Howsam v. Dean Witter*, 537 U.S. 79" (2002). Opp. 23. That argument is, quite simply, bizarre. *Howsam* took a *broad* view of what issues are to be

decided by an arbitrator, as opposed to a court, and held that the issue in that case (whether a dispute was "eligible for submission to arbitration" on timeliness grounds) should be decided by the arbitrator. *See* 537 U.S. at 83-85. Respondents assert that *Howsam* helps them because it recognized that courts must resolve gateway "'questions of arbitrability.'" Opp. 23 (quoting 537 U.S. at 83-84). But *Howsam* made clear that the realm of gateway "questions of arbitrability" for a court to decide is extremely narrow. *See* 537 U.S. at 84-85. If anything, the question whether an underlying contract is illegal is even more obviously *not* a gateway "question of arbitrability" than the "eligib[ility] for submission to arbitration" question at issue in *Howsam* itself. Thus, *Howsam* only confirms petitioner's argument that allegations of illegality in the underlying contract (as opposed to the arbitration clause) must be decided by an arbitrator, not a court, and thus provide no basis for denying a motion to compel arbitration.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

DAVID J. YOUNG
AMY L. BROWN
PIERRE H. BERGERON
SQUIRE, SANDERS & DEMPSEY LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20044

CHRISTOPHER LANDAU
Counsel of Record
MICHAEL SHUMSKY
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

May 27, 2005